Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FRICKER,

Petitioner,

vs.

NEW YORK CITY OFF TRACK BETTING CORPORATION,

Respondent,

– and –

"JOHN DOE,"

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioner having sued for personal injuries claiming that a third party's assault upon him in premises of respondent, a state agency, was due to respondent's negligence, including its failure to provide security as mandated by statute, and that its negligence proximately caused his injuries; and the trial court, contrary to binding precedent of the state's highest appellate court and both parties' requested jury instructions, having refused any jury charge on intervening cause; and the jury, with no judicial guidance on that core issue, having found respondent's negligence, but not proximate cause; and an intermediate appellate court, for one of two judicial departments in which respondent operates, upon petitioner's appeal from the resulting judgment, having affirmed, contrary to such precedent: did denial by the state's highest appellate court of petitioner's motion for leave to appeal such affirmance, made in express reliance upon that court's own precedents and the doctrine of *stare decisis*, violate the due process and the equal protection clauses of the Fourteenth Amendment?

2. Should petitioner have anticipated that the state's highest appellate court, upon such motion, would fail to apply its own precedents in order to maintain uniformity and consistency of law in such cases, and therefore have earlier raised expressly the due process and equal protection issues now sought to be raised before this Court?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the New York Court of Appeals. The New York City Off-Track Betting Corporation ("respondent" or "OTB") is ". . . a body corporate and politic constituting a public benefit corporation", created pursuant to § 603(1) of the New York Racing, Pari-Mutuel Wagering and Breeding Law. The perpetrator of the alleged assault upon petitioner, the "Doe" defendant herein, was able to flee respondent's premises without being apprehended or identified (Trial Transcript ["Tr."] 139-140; Plaintiff's Exh. 1), and "Doe" was never identified or served in this action.

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PETITION FOR WRIT OF CERTIORARI

William Fricker, the petitioner herein, respectfully prays that a writ of certiorari issue to review the final decree of the Court of Appeals of the State of New York, entered in the above-entitled case on September 7, 1995.

OPINIONS AND ORDERS BELOW

Such final decree, an order of the New York Court of Appeals rendered without opinion, is reported at 86 N.Y.2d 706,

but not unofficially, and is included in the Appendix to this Petition, p. A-1. The prior opinion and order of the Appellate Division of the New York Supreme Court, Second Department, entered March 27, 1995, not officially reported, is reported at 624 N.Y.S.2d 928, and is included in the Appendix, p. A-2. The prior judgment of the New York Supreme Court, Queens County ("the trial court"), entered on July 19, 1993, with the jury's general verdict upon which it was entered, are unreported, and are included in the Appendix, p. A-4.

STATEMENT OF JURISDICTION

Such final decree of the Court of Appeals was entered on September 7, 1995. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, providing:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following constitutional, statutory and regulatory provisions are also involved, and are included at the Appendix:

> Article VI, §§ 4(a), 4(b) and 6(a), of the New York Constitution;

§§ 5513(a) and (b), 5601(b)(1) and 5602(a)(1)(i) of the New York Civil Practice Law and Rules ("CPLR");

§ 500.11(d) and (g) of the Rules of the New York Court of Appeals;

§§ 601(3), 602(6), 603(1) and 605 of the New York Racing, Pari-Mutuel Wagering and Breeding Law;

9 NYCRR (the Official Compilation of Codes, Rules and Regulations of the State of New York) § 5203.1;

9 NYCRR § 5204.1.

STATEMENT OF CASE

OTB operates betting parlors in New York City (§§ 601(3), 602(6) and 603(1) of the New York Racing, Pari-Mutuel Wagering and Breeding Law; Appendix, pp. A-8 and A-9). It operates in two separate judicial departments (of the four in New York State), as the City consists of five counties, two in the First Department, and three, including Queens County, in the Second Department (Article VI, §§ 4(a) and 6(a), of the New York Constitution; Appendix, p. A-7).

An intermediate appellate court, the Appellate Division, sits in each department (Article VI, § 4(b), of such Constitution; Appendix, p. A-7). It

> ". . . is a single State-wide court divided into departments for administrative convenience . . . . [citations omitted]". *Mountain View Coach Lines, Inc.* v. *Storms*, 102 A.D.2d 663, at 664 (2d Dep't 1984).

The Court of Appeals is the state's highest appellate court, to which certain appeals may be taken as of right (*e.g.*, § 5601(b)(1) CPLR, Appendix, p. A-10) and others, only by permission (*e.g.*, § 5602(a)(1)(i) CPLR, Appendix, p. A-11).

As petitioner was injured in an OTB parlor in Queens County and resided there, his negligence action was brought, on or about April 27, 1988, in New York Supreme Court, Queens County ("the trial court").

He claimed in the action that he was assaulted by a third party ("Doe") in OTB's betting parlor; that OTB negligently failed to provide security there, as mandated by statute, and to keep the floor there clean and dry; and that OTB's negligence proximately caused his injuries.

On November 6, 9, 12 and 13, 1992, the issues of respondent OTB's liability were tried before the jury.

Petitioner testified at trial that in the fifteen-minute period before "Doe" assaulted him, "Doe" also elbowed other OTB patrons, and that when "Doe", who had been drinking, kicked and punched him, he lost his balance, slipped on a wet floor littered with wet paper, and fell, fracturing his leg. (Tr. 118, 125-126, 129-138, 148-155, 160; Plaintiff's Exhibit 10)

At trial, petitioner also relied upon § 605 of the New York Racing, Pari-Mutuel Wagering and Breeding Law, which provides:

> *§ 605. Policing of off-track betting*
>
> 1. The corporation [*i.e.*, OTB] *shall*, at its own expense, *provide such policing as may be necessary to preserve order* in branch offices and other facilities and premises of the corporation and enforce the provisions of this article and the rules and regulations promulgated pursuant thereto.
>
> 2. *Such policing shall be provided through employees of the corporation designated as special patrolmen* by the police commissioner of the city and serving pursuant to the provisions of section 434a-7.0 of the administrative code. *When so designated, such special patrolmen shall*, in the branch offices and the other facilities and premises

> of the corporation, and in the areas within five hundred feet therefrom:
>
> a. Be empowered to perform all functions and to enforce all laws, rules and regulations mentioned in subdivision one of this section and
>
> b. *Possess all of the powers and discharge all of the duties of regular members of the police force of the city."* (Emphasis added)

As to § 605, the trial record shows that at the premises involved, OTB had *no* employees "designated as special patrolmen", or *any other* security personnel, despite several prior criminal incidents there, some involving violence and other disorderly conduct (Tr. 39-42, 46-50, 57-58, 65-74, 141-142, 159-160, 178; Plaintiff's Exhibit 3); and that despite "Doe's" abuse of other patrons *before* assaulting petitioner, the following provision of 9 NYCRR § 5204.1, a regulation of the State Racing and Wagering Board as to which OTB owed a duty of "strict compliance" (9 NYCRR § 5203.1), had not been enforced against "Doe" (Tr. 129-131):

> *"Persons prohibited from entry into a branch office.* Any person . . . (c) who conducts himself in a manner which is offensive or disturbing to other individuals . . . may not enter a branch office, or remain there if already in a branch office."

Further, OTB's Associate Director of Security testified that it *did* have uniformed "contract" guards at *other* OTB betting parlors on the day petitioner was injured, and that their presence in them - though they were not OTB employees or empowered to use weapons, and had no powers of special patrolmen - was intended to, *and did*, deter crime in them. (Tr. 44-45, 51-52). This was tantamount to an admission that OTB's negligent failure to provide necessary policing, which the jury found, *had* proximately caused petitioner's injuries.

As the issue of intervening cause (*i.e.*, "Doe's" assault) at the core of all other proximate-cause issues in this case was manifest, *both* parties requested the trial court to give the jury

specific instruction on that key issue. Yet the trial court refused to do so, and therefore also failed to marshall the evidence on such omitted instruction. (Tr. 240, 309-310, Court Exhibits 2, 3 and 5, and PJI 2:72, all included in Appendix, pp. A-15-A-26)

While the jury's general verdict was for OTB, its specific findings make clear that such verdict resulted from the trial court's failure to instruct it on intervening cause. The jury thus found:

> "[that respondent *had* been] . . . negligent in failing to provide such policing as was necessary to preserve order in its branch office, according to Section 605 of the Racing, Pari-Mutual Wagering and Breeding Law" (Appendix, p. A-6);
>
> "[and also *had* been] . . . negligent in failing to maintain the floor of the parlor in a reasonably safe condition" (Appendix, p. A-6);

but also found that OTB's negligence had *not* been ". . . a proximate cause of injury to the plaintiff" (Appendix, p. A-6).

As recognized by binding precedents of the Court of Appeals, discussed in Point I, there can be no adequate jury charge on proximate-cause issues in a case like this one, or proper understanding by the jury of those issues, without a *specific* jury charge on intervening cause of the kind that the trial court refused to give. Left without judicial guidance in dealing with that central issue, the jury's findings of no proximate cause plainly rested on a legal assumption which *either* party's requested charges on intervening cause would have expressly rejected as erroneous - namely, that such an intervening cause as "Doe's" assault necessarily breaks the chain of proximate causation. Moreover, *either* requested charge would have informed the jury that its *finding* of OTB's *negligent failure to provide security, i.e.*, that consequent harm to patrons *was* foreseeable, *contradicted* OTB's claim that "Doe's" assault had severed the causal nexus between such negligence and petitioner's injuries.

Judgment for OTB on the jury's verdict was entered on July 19, 1993 (Appendix, p. A-4). Upon petitioner's appeal as of right therefrom, the Appellate Division, Second Department, by order entered March 27, 1995, affirmed. Though petitioner fully briefed all such issues ("Brief for Plaintiff-Appellant"), its opinion made no reference at all to the concept of intervening cause or to the precedents of the Court of Appeals *requiring* a *specific* jury instruction on that subject in cases presenting such issue. (Appendix, p. A-2)

Petitioner's undersigned counsel, mindful of the Court of Appeals' vital function of maintaining uniformity and consistency of law under the doctrine of *stare decisis*, then moved for leave to appeal to the Court of Appeals, pursuant to § 5602(a)(1)(i) CPLR and § 500.11(d) of its Rules. In doing so, counsel acknowledges, he did not explicitly frame the issue raised before this Court in its constitutional dimension, but rather as involving an intermediate appellate court's failure to adhere to binding precedents - a failure one could reasonably expect to be duly corrected by the Court of Appeals. Thus, the motion for leave to appeal expressly made and documented that a specific jury instruction on intervening cause was necessary on the facts of this case, under the Court of Appeals' own precedents; that such precedents had been adhered to by the Appellate Division, First Department, in which OTB also conducts its business; that both parties had requested such an instruction; and that the trial court nevertheless had refused to give either requested charge on that core issue. (Petitioner's "Motion for Leave to Appeal")

For like reasons, petitioner chose not to unduly complicate what was then an ordinary personal-injury action, by raising such constitutional issues before the Court of Appeals, as by attempting to appeal as of right to that court on the ground that the Appellate Division order ". . . directly involved the construction of the constitution . . . of the United States . . . ." (§ 5601(b)(1) CPLR)

While petitioner's motion for leave to appeal was denied by the Court of Appeals,[1] petitioner emphasizes, for its relevance to the specific relief sought by this Petition (as stated in the Conclusion below), that such motion was served and filed within the same time period as would have applied had he noticed an appeal as of right to the Court of Appeals (§ 5513(a) and (b) CPLR).

REASONS FOR GRANTING WRIT

I.

Certiorari Should Be Granted to Vindicate the Fundamental Doctrine of Stare Decisis, Without Which There Can Be Neither Due Process of Law Nor Equal Protection of the Laws.

The jury's findings of OTB's negligence were, under New York law, fundamentally inconsistent with its findings on proximate cause. Such inconsistency was due *not* to any misapprehension by the jury of the trial court's instructions, but to that court's failure, though requested by *both* parties to do so, *to* instruct the jury on intervening cause as binding precedent required.

Thus, the jury, in finding OTB negligent, *necessarily* determined that harm to a patron such as petitioner *was* the *foreseeable* consequence of its failure to provide proper security and maintenance at its betting parlor.[2] To find negligence,

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[1] Because it was denied without opinion, petitioner had no basis to seek reargument pursuant to the court's Rule § 500.11(g).

[2] Indeed, both § 605 of the governing statute and 9 NYCRR § 5204.1 (pp. 4-5 above) confirm that, from the very nature of the activity contemplated at OTB's betting parlors, the risk of harm to patrons absent proper policing was both foreseeable *and foreseen* - by the New York Legislature, the State Racing and Wagering Board, and OTB itself. Petitioner was clearly within the class of persons, patrons, the cited provisions were intended to protect. Indeed, OTB's failures to comply with them, at the premises concerned, discriminated against petitioner by denying him *any* protection - not even that afforded patrons at those other OTB premises utilizing uniformed "contract guards".

such a determination was required not only by decisions of the New York Court of Appeals concerning the very concept of negligence[3], but also by the trial court's jury instructions in this case on the negligence issues:

> "Negligence requires both *a foreseeable danger of an accident to another and conduct unreasonable in proportion to the danger.* A person is not responsible for the consequences of his or her conduct *unless the risk of an accident was reasonably foreseeable.*"
>
> "If a reasonably prudent person *could not foresee* any accident as a result of his or her conduct, or his or her conduct was reasonable *in the light of what*

---

[3] *Waters* v. *New York City Housing Authority*, 69 N.Y.2d 225 (1987) (defendant's failure to repair its building's security system not negligent as to a plaintiff criminally accosted on the street and forced into the unlocked building, where, neither tenant nor invitee, she was harmed; owners' duty to protect against criminal acts owed only ". . . to tenants and others who might reasonably be expected to be on the premises" [69 N.Y.2d at 230]). *Waters* states:

> "[T]he concept of a duty of care, which is essential to the law of negligence, has meaning only when it is considered in relation to both *the harm that the duty exists to prevent* and the class of individuals to whom it is owed. '*The risk reasonably to be perceived defines the duty to be obeyed*, and risk imports relation; it is *risk* to another or to others *within the range of apprehension*' that *delimits the duty's scope* (*Palsgraf v. Long Is. R.R. Co.*, [248 N.Y. 339 (1928)], *supra*, p 344)." (69 N.Y.2d at 228-229; emphasis added)

See also Danielenko v. *Kinney Rent A Car, Inc.*, 57 N.Y.2d 198, at 204 (1982):

> "Whether a breach of duty has occurred . . . depends upon whether *the resulting injury was a reasonably foreseeable consequence of the defendants' conduct.* 'If the defendant *could not reasonably foresee any injury as a result of his act*, or if his conduct was reasonable *in the light of what he could anticipate*, there is *no negligence*, and no liability' (Prosser, Torts [4th ed], § 43, p 250)." (Emphasis added)

> *he or she could foresee*, there is *no negligence*. Conversely, there is negligence if a reasonably prudent person *could foresee* an accident as a result of his or her conduct, and his or her conduct was unreasonable *in the light of what he or she could foresee*." (Tr. 285-286; emphasis added)

Yet, under New York law, forseeability of harm is an integral element not only of negligence, but also of the concept of intervening cause. *See, e.g.*, the Court of Appeals' decision in *Derdiarian* v. *Felix Contracting Corp.*, 51 N.Y.2d 308 (1980), making clear that whether "Doe's" assault was such an intervening cause as to have been "superseding" rather than concurrent - breaking the causal connection between OTB's negligence and petitioner's injuries - depended on the *very same* finding of foreseeability of injury to patrons already made by the jury when it found OTB negligent in policing and maintenance:

> *"Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed.* In such a case, liability turns upon *whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence* . . . . [citations omitted]. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus . . . . [citations omitted]. Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve." (51 N.Y.2d at 315; emphasis added)

The Court of Appeals' decision in *Kush* v. *City of Buffalo*, 59 N.Y.2d 26, at 33 (1983) is also highly pertinent:

> "[while] . . . an intervening intentional or criminal act will generally sever the liability of the original tort-feasor [citations omitted] . . . . [t]hat doctrine has *no application when the intentional or criminal intervention of a third party or parties is reasonably foreseeable* [citations omitted]." (Emphasis added)

These Court of Appeals' decisions cannot be reconciled with the trial court's refusal to charge the jury on intervening cause in this case, or with the rulings of the Appellate Division, Second Department, and the Court of Appeals. Heightening the impact of such inconsistent rulings are the facts that negligence litigation is widespread in New York and that issues of intervening cause commonly arise in such litigation. Indeed, this issue will likely recur as to OTB's branches situated throughout the City of New York - *i.e.*, in both the First and Second Departments. *Compare* the rulings in this case *with* the following holding of the Appellate Division, *First* Department, in *Bjelicic* v. *Lynned Realty Corp.*, 152 A.D.2d 151, at 154-155 (1st Dep't 1989):

> ". . . the court committed reversible error *in refusing to charge the jury on the issue of foreseeability of an intervening cause as requested by appellants . . . . The jury in this case found that respondents were negligent but did not consider this negligence a proximate cause of the accident. This issue was, therefore, of critical significance to appellants' case. . . .* The court's failure to charge the jury as requested by appellants was *a fundamental error which prevented the jury from fairly considering the issue presented.* [Citations omitted]
>
> Although the jurors were given an adequate definition of proximate cause and were told that there may be more than one proximate cause of an accident, *the court should have also instructed the jurors that, under New York law, the intervening act of a third person between the defendants' conduct and the plaintiffs' injury does not automatically*

> *sever the causal connection.* 'In such a case, liability turns upon *whether the intervening act is a normal or foreseeable consequence* of the situation created by the defendant's negligence' (*Derdiarian v. Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]; *Kush v. City of Buffalo*, 59 NY2d 26, 32-34 [1983]). *Appellants requested that the court instruct the jury that if they found respondents had been negligent but that appellants' injuries were caused by a third person . . . respondents would nevertheless be liable if a reasonably prudent person would 'have foreseen an act of the kind committed by the third person as a probable consequence' of respondents' negligence. This requested charge, taken from PJI 2:72, was appropriate and necessary in view of the evidence.*" (Emphasis added)[4]

Thus, the jury's findings of OTB's negligence necessarily determined that harm to patrons *was* the foreseeable consequence of OTB's breaches of its duties of reasonable care. Had the jury been instructed, as required, upon the decisive proximate-cause issue in this case, *i.e.*, "Doe's" assault as an intervening cause, the *very same* determinations of foreseeability of harm made in the negligence context would have warranted the further findings that the negligence so found had proximately caused petitioner's injuries. The jury's negligence findings are thus the strongest possible confirmation that the trial court's failure to charge the jury on the *identical* foreseeability issues inherent in the core proximate-cause issue, intervening cause, was gravely prejudicial.[5]

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[4] *Respondent's* requested intervening-cause charge in this case also cited pattern jury instruction PJI 2:72. (Appendix, pp. A-24-25)

[5] This is especially so since the trial court charged proximate cause immediately after negligence (*e.g.*, Tr. 284-286 and 294-296). In any event, under New York law, failure to instruct the jury on a pivotal intervening-cause issue must be deemed prejudicial error. *See, e.g., Smulczeski* v. *City Center of Music & Drama, Inc.*, 3 N.Y.2d 498, 501 (1957) (as case went to jury on two charges, one erroneous and one correct, and it is impossible

(Footnote continued)

This is no longer "merely" an issue of New York law, for the Court of Appeals' ruling implicates petitioner's rights to due process and equal protection under the Fourteenth Amendment. If the state's highest appellate court fails to vindicate the doctrine of *stare decisis* in individual cases, arbitrary and capricious decisions, unjustifiably differentiating between parties whose material circumstances and conditions are the same, must follow. *Cf.*, *Marchant* v. *Pennsylvania RR. Co.*, 153 U.S. 380 (1894) (due process and equal protection require determination of rights in accordance with general standards applicable to all in like condition, citing *Missouri* v. *Lewis*, 101 U.S. 22 [1879], *Hayes* v. *Missouri*, 120 U.S. 68 [1887] and *Barbier* v. *Connolly*, 113 U.S. 27 [1885] to same effect).[6]

That the state's decision is judicial and not legislative is immaterial to the Fourteenth Amendment. *See*, *e.g.*, *Saunders* v. *Shaw*, 244 U.S. 317 (1917), holding the due process clause violated by a state supreme court's reversal and entry of judgment absolute against a party on an issue as to which, at trial, he had no occasion or proper opportunity to present his evidence:

> "The denial of rights given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278." (244 U.S. at 320)

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to tell on which jury verdict rested, it must be set aside); *Caceres* v. *New York City Health and Hospitals Corp.*, 74 A.D.2d 619, at 620 (2d Dep't 1980) (jury's general verdict prevents determining whether it may have relied on erroneous charge in reaching verdict; new trial required); *Parker* v. *Weisner*, 65 A.D.2d 543, at 543-544 (1st Dep't 1978) (same effect). *Cf. Stoop* v. *Kurtz*, 121 A.D.2d 529, at 530 (2d Dep't 1986) ("plaintiff's contentions did not receive fair consideration by the jury" due to confusing charge; new trial warranted so jury may consider issues "without the danger of confusion . . . as to the applicable law" [citations omitted]).

[6] *Ohio* v. *Akron Metropolitan Park District*, 281 U.S. 74 (1930) is not to the contrary. Petitioner's right to have his claim determined in accordance with precedent was violated at every level herein.

Stare decisis does not assure or mandate the same *outcome* in cases presenting like issues, but does require the same legal rules to be applied to them. Nor does it fix past judicial rulings as immutable. But under the Fourteenth Amendment, the particular duty of the state's highest appellate court, unless it chooses to overrule or limit its prior rulings of general application, is to adhere to and to implement them uniformly and consistently in all cases to which they apply. *See*, *e.g.*, *Mountain View Coach Lines, Inc.* v. *Storms*, *supra*, 102 A.D.2d at 664-665 (*stare decisis* ". . . necessary to maintain uniformity and consistency . . . . [citation omitted]"). If the doctrine of *stare decisis* is deemed merely optional by the state's highest appellate court, arbitrary, capricious and discriminatory decisions in state-court litigation are inevitable.

We recognize that:

> "An order of a court of last resort declining to review a case is not ordinarily the judgment which is reviewable under § 1257; in that event, the reviewable judgment is that of the highest court possessing and exercising jurisdiction." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, ¶ 3.13, at pp. 115-116 (7th Ed. 1993)

However, as the quoted paragraph concludes:

> "Also reviewable is a refusal to accept an appeal, such as for failure to pay the filing fee, where the refusal in and of itself raises a federal constitutional issue. *Burns v. Ohio*, 360 U.S. 252 (1959)." (*Id.* at p. 116)

This is such a case. The Court of Appeals' denial of petitioner's motion for leave to appeal itself violates his Fourteenth Amendment right to have that court apply its own precedents or expressly overrule or limit them, so that his claims may be determined in accordance with a uniform and consistent body of law, not arbitrarily.

II.

This Court's Jurisdiction Should Be Sustained Although Petitioner Did Not Anticipate that the New York Court of Appeals Would Fail to Fulfill Its Fundamental Duty to Maintain Consistency and Uniformity With Its Own Precedents in Negligence Cases Presenting Issues of Intervening Cause.

Petitioner's counsel has acknowledged that he did not explicitly raise below the constitutional issues now presented, anticipating that the Court of Appeals would perform its duty to assure application of its own precedents in negligence cases such as this one. Respectfully, such expectation was entirely proper, for the *same* reason that such court's ruling, defeating that expectation, is constitutionally infirm.[7]

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[7] *See generally Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, at 85-87 (footnote 9) (1980) (federal claims adequately presented though not raised below when highest state court renders unexpected interpretation of state law); *Herndon* v. *Georgia*, 295 U.S. 441, at 443-446 (1935) (appellant should have anticipated a ruling of Georgia Supreme Court construing statute substantially as it had previously in another case); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932) (dismissing writ of certiorari as untimely where claimed violation of federal right, based on trial court's entry of judgment without notice and opportunity to be heard, first raised on petition for rehearing in state supreme court, and same ground of objection raised throughout proceedings but solely as matter of state law); *Ohio* v. *Akron Metropolitan Park District*, *supra*, 281 U.S. at 79 (assuming, for the argument, that it would have been "speculative" to raise constitutional issue before Ohio Supreme Court acted in manner presenting such issue); *Saunders* v. *Shaw*, *supra*, 244 U.S. at 317 (constitutional issue timely raised where it arose only after, and as result of, Louisiana Supreme Court's ruling upon rehearing).

CONCLUSION

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari issue from this Honorable Court to review the final decree of the Court of Appeals of the State of New York in this case. In the event that the Petition is granted, petitioner prays that such final decree be reversed, that the cause be remanded, and that the New York Court of Appeals be directed to grant petitioner's motion for leave to appeal to such Court upon the issues raised herein.

JONATHAN C. REITER, ESQ.*
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* Counsel of Record

APPENDIX

APPENDIX

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State of New York.
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh *day of* September 1995

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 798
William Fricker,

Appellant,

v.

New York City Off Track Betting Corporation,

Respondent,

et al.,

Defendant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen

Stuart M. Cohen
Deputy Clerk of the Court

7277q
H/hu

_____ AD2d _____ Argued - March 3, 1995

CHARLES B. LAWRENCE, J.P.
FRED T. SANTUCCI
WILLIAM D. FRIEDMANN
ANITA R. FLORIO, JJ.

93-05302

William Fricker, appellant, v New York City Off Track Betting Corporation, respondent, et al., defendant.

DECISION & ORDER

Jonathan C. Reiter, New York, N.Y., for appellant.

Ahmuty, Demers & McManus, Albertson, N.Y. (Frederick B. Simpson and Pellegrino L. Certa of counsel), for respondent.

In a negligence action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Queens County (Graci, J.), dated July 19, 1993, which, upon a jury verdict finding that the negligence of the defendant New York City Off Track Betting Corporation was not the proximate cause of the plaintiff's injuries, is in favor of the defendant New York City Off Track Betting Corporation and against him.

ORDERED that the judgment is affirmed, with costs.

Contrary to the plaintiff's contention, the record reveals that the court's charge, as a whole, sufficiently instructed the jury about the law of proximate cause and the factual issues to be resolved (*see, Scandell v Salerno,* 155 AD2d 523; *Bartlett v General Elec. Co.,* 90 AD2d 183).

We have examined the plaintiff's remaining contentions and find them to be without merit.

LAWRENCE, J.P., SANTUCCI, FRIEDMANN and FLORIO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

March 27, 1995

FRICKER v NEW YORK CITY OFF TRACK BETTING CORPORATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

WILLIAM FRICKER,

Plaintiff,

-against-

NEW YORK CITY OFF TRACK BETTING CORPORATION and JOHN DOE,

Defendant.

----------X

COUNTER-JUDGMENT

INDEX NO.: 12470/88

Calendar #: I 4944

The above entitled action having duly come on for trial before Honorable Justice Angelo Graci and a jury at Part 5 of the Supreme Court held in and for the County of Queens at the Courthouse located at 88-11 Sutphin Boulevard, Queens, New York on the 6th, 9th, 12th and 13th of November, 1992, and the plaintiff, WILLIAM FRICKER, having appeared by Jonathan C. Reiter, Esq. and the defendant, NEW YORK CITY OFF TRACK BETTING CORPORATION, by Eugene F. Sweeney, Esq., and the issues having duly been tried, and the Court having directed the jury to find a general verdict on the following questions:

AND, the jury having rendered a verdict in favor of defendant, NEW YORK CITY OFF TRACK BETTING CORPORATION, on November 13, 1993,

AND, the costs of the defendant, NEW YORK CITY OFF TRACK BETTING CORPORATION, having been taxed at 950.00 dollars,

NOW, on the motion of Eugene F. Sweeney, Esq., attorney for the defendant, it is,

adjudged that defendant, NEW YORK CITY OFF TRACK BETTING,

Have judgment rendered in its favor against the plaintiff, and that the defendant, recover from the plaintiff the sum of 950.00 dollars, as and for its costs and that the defendant, have execution, therefore.

/s/ Gloria D'Amico

CLERK

Judgement signed this 19 day of July, 1993.

Plaintiff — Fricker
88-06 Parklane So
Woodhaven N.Y.

Deft — N.Y.C. Off Track Betting
c/o Ahmuty, Demers & McManus, Esqs.
500 I.U. Willets Road
Albertson N.Y. 11507

1. Was the defendant, OTB, negligent in failing to provide such policing as was necessary to preserve order in its branch office, according to Section 605 of the Racing, Pari-Mutuel Wagering and Breeding Law?

YES

a) Was this a proximate cause of injury to the plaintiff?

NO

2. Was the defendant, OTB, negligent in failing to maintain the floor of the parlor in a reasonably safe condition?

YES

a) Was this a proximate cause of injury to the plaintiff?

NO

CONSTITUTION OF STATE OF NEW YORK:

§ 4. [Judicial departments; appellate divisions of supreme court and justices thereof; temporary designation of additional justices; transfer of appeals; jurisdiction]

a. The state shall be divided into four judicial departments. The first department shall consist of the counties within the first judicial district of the state. The second department shall consist of the counties within the second, ninth, tenth and eleventh judicial districts of the state. The third department shall consist of the counties within the third, fourth and sixth judicial districts of the state. The fourth department shall consist of the counties within the fifth, seventh and eighth judicial districts of the state. Each department shall be bounded by the lines of judicial districts. Once every ten years the legislature may alter the boundaries of the judicial departments, but without changing the number thereof.

b. The appellate divisions of the supreme court are continued, and shall consist of seven justices of the supreme court in each of the first and second departments, and five justices in each of the other departments. In each appellate division, four justices shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case.

* * *

§ 6 [Judicial districts, number and composition; supreme court, continuation and composition, election and terms of justices]

a. The state shall be divided into eleven judicial districts. The first judicial district shall consist of the counties of Bronx and New York. The second judicial district shall consist of the counties of Kings and Richmond. The third judicial district shall consist of the counties of Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan, and Ulster. The fourth judicial district shall consist of the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence,

Saratoga, Schenectady, Warren and Washington. The fifth judicial district shall consist of the counties of Herkimer, Jefferson, Lewis, Oneida, Onondaga, and Oswego. The sixth judicial district shall consist of the counties of Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins. The seventh judicial district shall consist of the counties of Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates. The eighth judicial district shall consist of the counties of Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming. The ninth judicial district shall consist of the counties of Dutchess, Orange, Putnam, Rockland and Westchester. The tenth judicial district shall consist of the counties of Nassau and Suffolk. The eleventh judicial district shall consist of the county of Queens.

* * *

NEW YORK RACING, PARI-MUTUEL WAGERING AND BREEDING LAW:

§ 601. Declaration of policy and statement of purposes

It is hereby found, determined and declared:

3. That the operation of an off-track pari-mutuel betting system by a public benefit corporation in New York city, in accordance with the provision of the New York state off-track pari-mutuel betting law, is deemed to be a matter of state concern and a public purpose which cannot be adequately attained except by the powers of government, and that such public benefit corporation in the exercise of the powers conferred upon it by this article, will perform a governmental function.

§ 602. Definitions

As used in this article, the following terms shall mean and include:

* * *

6. "City." The city of New York.

* * *

§ 603. New York city off-track betting corporation

1. A corporation to be known as the "New York city off-track betting corporation" is hereby created. Such corporation shall be a body corporate and politic constituting a public benefit corporation. It shall be administered by a board of directors consisting of five members, two of whom shall be appointed by the mayor, who shall serve at his pleasure and who may be public officers of the city. The remaining three directors shall be appointed by the mayor for fixed terms as hereinafter provided.

* * *

§ 605. Policing of off-track betting

1. The corporation shall, at its own expense, provide such policing as may be necessary to preserve order in branch offices and other facilities and premises of the corporation and enforce the provisions of this article and the rules and regulations promulgated pursuant thereto.

2. Such policing shall be provided through employees of the corporation designated as special patrolmen by the police commissioner of the city and serving pursuant to the provisions of section 434a-7.0 of the administrative code. When so designated, such special patrolmen shall, in the branch offices and the other facilities and premises of the corporation, and in the areas within five hundred feet therefrom:

a. Be empowered to perform all functions and to enforce all laws, rules and regulations mentioned in subdivision one of this section and

b. Possess all of the powers and discharge all of the duties of regular members of the police force of the city.

CIVIL PRACTICE LAW AND RULES OF STATE OF NEW YORK

§ 5513. Time to take appeal, cross-appeal or move for permission to appeal.

(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, his appeal must be taken within thirty days thereof.

(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

* * *

§ 5601. Appeals to the court of appeals as of right.

* * *

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States. . . .

* * *

§ 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeals may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right. . . .

* * *

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF STATE OF NEW YORK:

Section 5203.1 Condition of operation. A condition precedent to the exercise of authority by any corporation is strict compliance with each rule, regulation, decision, directive, or order of the State Racing and Wagering Board. The State Board may suspend or revoke in whole or in part the operating authority of a corporation.

Section 5204.1 Persons prohibited from entry into a branch office. Any person:

(a) who has been convicted of a gambling offense;

(b) who does not intend in good faith to transact business with a corporation;

(c) who conducts himself in a manner which is offensive or disturbing to other individuals;

(d) whose acts are inconsistent with the orderly conduct of the business of a corporation; or

(e) who is eating or drinking;

may not enter a branch office, or remain there if already in a branch office.

RULES OF NEW YORK COURT OF APPEALS:

§ 500.11 Motions

* * *

(d) Permission to Appeal in Civil Cases. The motion shall be made on 10 copies of the moving papers in support of the motion, which shall in form comply with section 500.1 of this Part, and proof of service of 3 copies on each other party. In addition, movant must file one copy of the record below, or appendix if the appendix method was used in the court below, and one copy of each party's briefs below. Any motion, including those affecting quasicriminal proceedings such as habeas corpus, may be made on a single set of the moving papers with proof of service of one copy in instances where there is simultaneously filed with the court an affidavit of indigency or extreme financial hardship. In accordance with the court's long-standing practice, leave to appeal will be granted upon the concurrence of two judges.

(1) The moving papers shall be a single document, bound on the left, and shall contain in the order here indicated:

(i) A notice stating the return date and the relief requested.

(ii) A concise statement of the questions presented for review.

(iii) A statement of the procedural history of the case, including a showing of the timeliness of the motion. If the motion for leave to appeal is made directly to this court, without there first having been a motion at the Appellate Division, the moving papers to this court shall demonstrate timeliness by stating the date movant was served with the order or judgment sought to be appealed, with notice of entry. If the motion for leave to appeal is made to this court after there first having been a motion at the Appellate Division, the moving papers to this court shall demonstrate that the timeliness chain is intact by stating (a) the date movant was served with the order or judgment sought to be appealed, with notice of entry, (b) the date movant served his Appellate Division notice of motion upon his adversary, and (c) the date movant was served with the Appellate Division order denying leave to appeal with notice of entry. There shall be attached to the moving papers copies of each such order or judgment, together with its notice of entry, as well as copies of all opinions or memoranda rendered in the courts below. The papers shall note if no opinion was rendered.

(iv) A showing that this court has jurisdiction of the motion and of the proposed appeal, including that the order of judgment sought to be appealed from is a final determination or comes within the special class or nonfinal orders which are appealable by permission of the Court of Appeals (CPLR 5602[a][2]).

(v) A direct and concise argument showing why the questions presented merit review by this court, such as that they are novel or of public importance, or involve a conflict with prior decisions of this court, or there is a conflict among the Appellate Divisions. The particular portions of the record where the questions sought to be reviewed are raised and preserved shall be identified.

(2) On or before the return of the motion, the responding party may submit 10 copies of papers in opposition to the motion, together with proof of due service of 3 copies on each

other party. The opposing papers shall be a single document, bound on the left, and shall concisely present respondent's argument for dismissal or denial of the motion, with specific reference to movant's argument that the questions presented merit review. If respondent does not submit opposing papers, the filing by respondent of one copy of respondent's Appellate Division brief is mandatory.

(3) Movant's failure to comply with the service and filing requirements (all papers must be served at least eight days prior to the statutory return date and be filed in the clerk's office no later than Noon on the Friday preceding the return date) may result in dismissal of the motion.

* * *

(g) Reargument of Appeals and Motions

(1) The motion shall be made without oral argument on 10 copies of a brief or memorandum, reproduced in conformity with section 500.1 of this Part, which shall state briefly the ground upon which reargument is asked and the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portions of the record and to the authorities relied upon.

(2) On reargument of motions, a single brief or memorandum may be filed if that was the requirement on the original motion.

(3) The motion may not be based on the assertion for the first time of new points except for extraordinary and compelling reasons. Unless otherwise permitted by the court, the notice of motion shall be served not later than 30 days after the appeal on motion has been decided. Proof of service of 3 copies of the moving papers on each other party is required.

MATERIALS REGARDING PARTIES' REQUESTS TO CHARGE JURY ON INTERVENING CAUSE:

Trial Transcript, Page 240:

Proceedings

(In open court)

THE COURT: Yes, Counsel.

MR. REITER: I have no objection to the verdict sheet.

THE COURT: The verdict sheet is Court Exhibit 1.

(Document above described received in evidence as Court's Exhibit 1)

THE COURT: The plaintiff's first request to charge, Court Exhibit 2.

(Document above described received in evidence as Court's Exhibit 2)

THE COURT: Plaintiff's second request to charge, Court Exhibit 3.

(Document above described received in evidence as Court's Exhibit 3)

THE COURT: Plaintiff's proposed verdict sheet, Court Exhibit 4.

(Document above described received in evidence as Court's Exhibit 4)

THE COURT: Defendant's request to charge is Court Exhibit 5.

(Document above described received in evidence as Court's Exhibit 5)

Trial Transcript, Pages 309-310:

Court's Charge

* * *

THE COURT: Mr. Reiter, any additional exceptions or requests to charge other than what you have given me already?

MR. REITER: Your Honor, just since we didn't go on the record earlier on these requests, I just want to reserve my exceptions, that I have an exception to the fact of your Honor failing to charge all of the charges which have previously be submitted to your Honor as part of my plaintiff's first and second requests to charge.

THE COURT: The requests to charge were marked as court exhibits. And I mentioned whatever I don't give you, you have an exception.

MR. REITER: With respect to the matter at hand, since your Honor has already charged the jury, there are two things which I requested of your Honor which I think are important and which I think your Honor should have charged and I want to make the request if your Honor could please do it at this point. They were numbers four and five of plaintiff's first request to charge.

Number four was, there maybe more than one proximate cause of an occurrence. And number five, was the fact that an immediate cause of Mr. Fricker's injury was the criminal act of a third party does not prevent defendant OTB's negligence in failing to provide policing from also being a proximate cause of plaintiff's injury.

I think, under the facts of this case, that that element or that aspect of the proximate cause issue would be appropriate. I think your Honor probably meant to cover this in the charge but it really wasn't covered. I am asking that you do cover it.

THE COURT: The thing is this, as is mentioned, a proximate cause, and I will give there may be more than one proximate cause of an incident, but a proximate cause they

have to find. I am not going to give them number five because that may be misleading to them.

You have your exception, though.

MR. SWEENEY: I have no requests or exceptions, your Honor.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

.....X

WILLIAM FRICKER,

Plaintiff,

Index No.
12470/88

-against-

Cal. No.
I 4944

NEW YORK CITY OFF TRACK BETTING CORPORATION and "JOHN DOE",

Defendants.

.....

PLAINTIFF'S FIRST REQUESTS TO CHARGE ON LIABILITY

1. The Court is requested to charge Section 605 of the Racing, Pari-Mutuel Wagering and Breeding Law as follows:

"1. Policing of off-track betting. The corporation (i.e. the New York City Off Track Betting Corporation) shall, at its own expense, provide such policing as may be necessary to preserve order in branch offices and other facilities and premises of the corporation and enforce the provisions of this article and the rules and regulations promulgated pursuant thereto.

2. Such policing shall be provided through employees of the corporation designated as special patrolmen by the police commissioner of the city and serving pursuant to the provisions of section 434a-7.0 of the Administrative Code. When so designated, such special patrolmen shall, in the branch offices and the other facilities and premises of the corporation, and in the areas within five hundred feet therefrom:

a. Be empowered to perform all functions and to enforce all laws, rules and regulations mentioned in subdivision one of this section and

b. Possess all of the powers and discharge all of the duties of regular members of the police force of the city."

2. P.J.I. 2:25 - Statutory standard of care as follows:

Plaintiff claims that the defendant failed to comply with and thus violated Section 605 of the Racing, Pari-Mutuel Wagering and Breeding Law. If you find that defendant failed to comply with the statute, and if such violation was a proximate cause of injury to the plaintiff, then you must find for the plaintiff on the issue of liability.

3. If you find that the defendant failed to provide such policing as was necessary to preserve order in the branch office of OTB where Mr. Fricker was assaulted, then you must find that the defendant was negligent.

4. There may be more than one proximate cause of an occurrence.

5. The fact that the immediate cause of Mr. Fricker's injury was the criminal act of a third party does not prevent the defendant, OTB's, negligence, in failing to provide policing, from also being a proximate cause of plaintiff's injury.

6. If you find that the defendant's failure to provide such policing as was necessary to preserve order in the branch office where Mr. Fricker was assaulted was a substantial factor in bringing about Mr. Fricker's injury, then you will find that such failure was a proximate cause of Mr. Fricker's injury.

7. Under Section 605 of the Racing, Pari-Mutuel Wagering and Breeding Law, the defendant, OTB, had a duty to provide such policing as may be necessary to preserve order in branch offices and to enforce its own rules and regulations. One of those rules and regulations was 9 NYCRR Section 5204.1 which provides in relevant part as follows:

"Persons prohibited from entry into a branch office. Any person:

(c) who conducts himself in a manner which is offense or disturbing to other individuals;

may not enter a branch office, or remain there if already in a branch office (of OTB)."

Under this regulation, which has the force of law, (Racing Law §604(12), a person who conducted himself in a manner offensive or disturbing to other individuals was prohibited from entering or remaining at a branch office of OTB. If you find that the defendant, in the discharge of its statutory duty to provide policing, knew, or should have known, of a person who was conducting himself in an offensive or disturbing manner, and allowed him to remain in the branch office, and said individual thereafter caused injury to the plaintiff on the premises of the OTB branch office, then that would be evidence that OTB was negligent and its negligence would be a proximate cause of injury to the plaintiff.

8. PJI 2:12 (foreseeability) related to the facts as follows: If you find that it was reasonably foreseeable that an argument might break out between patrons of an OTB branch office over a person's trying to cut in line to make a bet, and that such an argument might escalate into an assault causing injury to one of the patrons, then the defendant, OTB, had a duty to provide such policing as would tend to prevent such an occurrence.

9. PJI 1:77 (failure to produce documents) related to the facts as follows: In this light you may consider the failure of defendant to produce: (1) the daily branch records of the OTB office for May 20, 1987 to show the assignment of betting clerks to specific windows; (2) the manpower report of the OTB office for May 20, 1987 to show what employees were present at the branch office the day of the occurrence; (3) the personnel records of Alice Bernstein.

Respectfully,

JONATHAN C. REITER, ESQ.
Attorney for Plaintiff
350 Fifth Avenue
New York, New York 10118

[Attachments reprinted above — namely, § 605 of the New York Racing, Pari-Mutuel Wagering and Breeding Law, and 9 NYCRR § 5204.1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

.....X

WILLIAM FRICKER,

Plaintiff,

-against-

NEW YORK CITY OFF TRACK BETTING CORPORATION and "JOHN DOE",

Defendants.

Index No. 12470/88

Cal. No. I 4944

.....X

PLAINTIFF'S SECOND REQUESTS TO CHARGE ON LIABILITY

10. If you find that the defendant, OTB, failed to provide such policing as was necessary to preserve order in its branch office at 63 Drive and Queens Boulevard, according to Section 605 of the Racing, Pari-Mutuel Wagering and Breeding Law, and you find that there is a substantial probability that the assault upon the plaintiff would have been deterred or prevented if defendant, OTB, had provided such policing, then that would be a proximate cause of injury to the plaintiff.

11. P.J.I. 1:92 General Instructions - Interested witness - Employee of Defendant: (adapted as follows)

The fact that the witnesses, Norman I. Heller, Philip Tommolino and Alice Bernstein are or were employed by the defendant, OTB, and the testimony you have heard of their relations with their employer may be considered by you in determining whether their testimony is in any way influenced by their present or former employment relationship with the defendant, OTB.

12. P.J.I. 2:90 (adapted as follows)

Plaintiff claims that the defendant, OTB, was negligent in failing to maintain the branch office in a reasonably safe condition in that the floor was wet and slippery and covered with debris. OTB had a duty to use reasonable care to keep the premises of its branch office at 63rd Drive and Queens Boulevard, Queens, New York, in a reasonably safe condition for the protection of patrons on the premises. In order to establish liability, the plaintiff must prove: 1) that the premises were not in a reasonably safe condition; 2) that defendant, OTB, was negligent in not keeping the premises in a reasonably safe condition; and 3) that defendant's negligence in allowing the condition to exist was a substantial factor in causing plaintiff's injury.

You must first consider whether the premises were in a reasonably safe condition. Plaintiff claims that the premises were not in a reasonably safe condition because the floor was wet and slippery and covered with debris. Defendant contends that the floor was in a reasonably safe condition. If you decide that the premises were in a reasonably safe condition, you will find for the defendant on this issue and proceed no further on this aspect of the claim. If you decide that the premises were not in a reasonably safe condition, you will proceed to consider whether the defendant was negligent in permitting the condition to exist.

Negligence is the failure to use reasonable care. Reasonable care means that degree of care which a reasonably prudent possessor of premises would use under the same circumstances. Negligence includes both a foreseeable danger of injury to another and conduct which is unreasonable in proportion to the danger. In deciding whether defendant was negligent, you must weigh the likelihood and seriousness of the risk of injury against the burdens involved in maintaining the premises.

Under the facts of this case, if you find that the floor of the OTB betting parlor was not in a reasonably safe condition and either a) defendant knew of the condition long enough before plaintiff's injury to have permitted defendant in the use

of reasonable care to have it corrected or take other suitable precautions or to give adequate warning and did not do so, or b) defendant did not know of the condition but in the use of reasonable care should have known of it and corrected it or taken other suitable precautions, then the defendant would be negligent. If, on the other hand, you find that defendant did not know of the condition and that by the use of reasonable care defendant would not have been able to discover and correct it, or if you find that defendant knew of the unsafe condition but took suitable precautions or gave plaintiff an adequate warning, you will find that defendant was not negligent.

If you find that the defendant was negligent in failing to maintain the floor in reasonably safe condition, you must next consider whether that negligence was a substantial factor in causing plaintiff's injury. An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as a cause of the injury. If you find the defendant's negligence was not a substantial factor in causing the injury, then you will find for defendant on this aspect of the claim. If you find that defendant's negligence was a substantial factor in causing plaintiff's injury then you will find for the plaintiff on this aspect of the claim.

[Note: That portion of the pattern charge dealing with foreseeability of Mr. Fricker's presence on the premises has been omitted since he was a patron of the OTB parlor and therefore there is no issue of fact as to whether it was foreseeable that he would be on the premises.]

Respectfully,

JONATHAN C. REITER, ESQ.
Attorney for Plaintiff
350 Fifth Avenue
New York, New York 10118-7696

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

WILLIAM FRICKER,

Plaintiff,

-against-

NEW YORK CITY OFF TRACK BETTING CORPORATION and "JOHN DOE",

Defendants.

REQUEST FOR JURY CHARGE

Index No.: 12470/88

Assigned To: Justice A. Graci

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S I R S :

PLEASE TAKE NOTICE, that the defendant, NEW YORK CITY OFF TRACK BETTING CORPORATION, respectfully submits the following as and for its proposed Request to Charge:

CHARGE NO. 1	PJI 1:60	BURDEN OF PROOF
CHARGE NO. 2	PJI 1:91	INTERESTED WITNESSES
CHARGE NO. 3	PJI 2:10	NEGLIGENCE DEFINED
CHARGE NO. 4	PJI 2:12	COMMON LAW STANDARD OF CARE FORESEEABILITY
CHARGE NO. 5	PJI 2:36	COMPARATIVE NEGLIGENCE BIFURCATED TRIAL
CHARGE NO. 6	PJI 2:70	PROXIMATE CAUSE

CHARGE NO. 7 PJI 2:72 PROXIMATE CAUSE - INTERVENING CAUSES

CHARGE NO. 8 PJI 2:90 POSSESSORS LIABILITY - STANDARD OF CARE

CHARGE NO. 9 I charge you that in this case the lack of supervision or security must be the proximate cause of harm done to the plaintiff. If you find that the nature of the incident complained of was unforeseen and could not be guarded against then you must find for the defendant. *Campbell v Step/Land*, 143 A.D.2d 111, 513 N.Y.S.2d 576.

CHARGE NO. 10 I charge you that the duty of the defendant to provide security to its patrons rests upon the foreseeability of the particular danger which proximately caused the harm. *Jacqueline S. etc, et al. v. The City of New York and The New York City Housing Authority*, 582 N.Y.S.2d 697 (A.D. 1st Dept. April 16, 1992); *Miller v. State of New York*, 62 N.Y.2d 506, 478 N.Y.S.2d 829.

CHARGE NO. 11 I charge you that the criminal assault on the plaintiff was a superseding, intervening criminal act which was not foreseeable and cannot be charged to the defendant. *Ianelli v. Powers*, 114 A.D.2d 157 (2nd Dept.), 489 N.Y.S.2d 377.

TO: JONATHAN C. REITER, ESQ.
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PJI 2:72. Proximate Cause-Intervening Causes

If you find that defendant was negligent but that plaintiff's injuries were caused by the act of a third person, defendant may be held liable for such injuries if you further find that a reasonably prudent person, situated as the defendant was prior to the happening of the incident, would have foreseen the act of the third person as a probable consequence of the defendant's negligence. If your finding is that a reasonably prudent person would not have foreseen the act of the third person as a probable consequence of defendant's negligence, then defendant is not responsible for plaintiff's injuries and your verdict must be for defendant.

No. 95-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FRICKER,

Petitioner,

—vs.—

NEW YORK CITY OFF TRACK BETTING CORPORATION,

Respondent,

—and—

"JOHN DOE,"

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1257 to review a state court decision when the petitioner did not exhaust all available remedies at the state level?

2. Whether the Supreme Court of the United States has jurisdiction to review a federal question that was never raised at the state level?

3. Whether the trial court's entire charge sufficiently apprised the jury of the applicable New York Law?

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STATEMENT OF THE CASE

The lawsuit which gives rise to this writ is a routine negligence action of dubious merit. This action was commenced after William Fricker ("petitioner"), was allegedly attacked by an unknown assailant ("John Doe") at a betting parlor owned by the Respondent, New York City Off Track Betting Corporation ("OTB").

The petitioner testified that John Doe, an intoxicated patron, kicked and punched him. While under attack, the petitioner also claims he slipped and fell on a wet floor.

The petitioner claimed that OTB was negligent in failing to maintain the floor and provide security pursuant to Section 605 of the Racing, Pari-Mutual Wagering and Breeding Law and that such failure was the proximate cause of his injury.

The testimony of the petitioner and the OTB clerk revealed that this was a spontaneous event that occurred within seconds and without warning. No proof was adduced that any security could have prevented this event.

The Associate Director of Security for OTB testified that this particular branch was the least troublesome and had the smallest number of incident reports. The petitioner himself testified that he had only witnessed one violent act at this location, when someone broke a clock. This testimony was refuted by a clerk employed by OTB who testified that the clock breaking incident occurred after the petitioner's injury, not before.

After both sides presented their case, the following charge was given to the jury:[1]

> Now, not only must you find there was negligence or a breach of duty or a violation of a specific statute by the defendant, you must find that such violation of statute or

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[1] The portion of the charge which forms the basis of the petitioner's constitutional claim is reprinted here at length.

a breach of other duty, as I will mention to you, was the proximate cause of such negligent conduct, and this caused the injury, before you could hold a defendant liable.

Now, an act or omission is a proximate cause of injury or an accident if it was a substantial factor in bringing about the accident or injury. That is, if it has such an effect in producing the injury or accident, that reasonable people would regard it as a cause of the injury or accident. And, of course, when we say proximate cause, means it was a substantial factor in bringing or causing the injury or accident.

Now, the plaintiff claims that the defendant, OTB failed to comply with, and thus violated, Section 605 of the Racing, Pari-Mutual Wagering and Greeting Law of the State of New York. Hereafter I refer to it as 605 of the Racing Law.

Now, if you find that the defendant violated the statute, and if that violation was a proximate cause of injury or accident to the plaintiff, then, of course, defendant is liable. However, we must address ourselves to the provision of the statute, and I am going to read that to you:

Section 605 of the New York State Racing Law, as I mentioned to you, provides as follows:

Policing Off Track Betting:

1. The corporation shall, at its own expense, provide such policing as may be necessary to preserve order in branch offices and other facilities and premises of the corporation and enforce provisions of this article and the rules and regulations promulgated pursuant thereto.

2. Such policing shall be provided through employees of the corporation designated as special patrolmen by the police commissioner of the city and serving pur-

suant to the provisions of Section 434A-7.0 of the Administrative Code.

When so designated, such special patrolmen, shall, in the branch offices and the other facilities and premises of the corporation and in the areas within 500 feet therefrom, (a) be empowered to perform all functions, perform all laws, rules and regulations mentioned in subdivision (1) of this section; (b) possess all of the duties of regular members of the police force of the city.

Pursuant to Section 604 of the New York State Racing Law, as I mentioned, the rules and regulations that were promulgated and some of these rules and regulations require that certain persons are prohibited from entering into a branch office:

Any person who conducts himself in a manner which is offensive and disturbing of individuals may not enter a branch office or remain there if already in a branch office.

Now, the plaintiff maintains that the failure to have a security guard at the branch office on May 20, 1987, was negligent and was a violation of the law and this was the proximate cause of the accident in which the plaintiff was involved on May 20, 1987 while a patron at the defendant's premises.

The portion of the law, I will read this to you again:

The corporation shall, at its own expense, provide such policing as may be necessary to preserve order in branch offices and other facilities and premises of the corporation and enforce provisions of the law and regulations promulgated pursuant thereto. The key word here which you must consider is, '. . . as may be necessary.' . . . Provide such policing as may be necessary to preserve order in the branch office.

> Now, the plaintiff maintains that based upon previous experience and based upon this law, that the defendant should have had security guards to police the premises and security guards at the particular branch. The defendant maintains that it was not necessary.
>
> * * *
>
> Ladies and Gentlemen of the jury, you are going to be asked to go to the jury room to consider your verdict on this case, and remember we are going to give you the verdict sheet to take with you and also I just wanted to mention something further: that if you find that the defendant was negligent, I have indicated to you that such negligence was a proximate cause of the plaintiff's injury and a proximate cause, you could have more than one proximate cause, but it must be at least a proximate cause of that injury.

The jury found OTB negligent for failing to provide adequate security and for failing to properly maintain the floor. The jury also determined that this negligence was not the proximate cause of the petitioner's injury.

The petitioner appealed this verdict on the grounds that the jury was not properly instructed on proximate cause. The Appellate Division, Second Department affirmed the trial court judgement, indicating that, as a whole, the charge was sufficient. The New York Court of Appeals (the state's highest appellate court) denied the petitioner's motion for leave to appeal.

At no time did petitioner move to reargue the motion for leave to appeal although it was his right to do so.

The petitioner concedes that he never raised the constitutional questions now presented.

REASONS FOR DENYING THE WRIT

The petitioner is not entitled to certiorari since he did not exhaust all legal remedies available to him in the New York Courts and he failed to raise the constitutional issues now before this court even though he had the full opportunity to do so. Further, the Supreme Court of the United States has no jurisdiction since a federal question does not exist. Finally, the jury was properly instructed under New York law.

I

THE PETITIONER FAILED TO FULLY EXHAUST HIS REMEDIES IN STATE COURT AND IS THEREFORE NOT ENTITLED TO CERTIORARI

The Supreme Court of the United States may only review the "final judgment or decrees rendered by the highest state court in which a decision could be had," 28 U.S.C. § 1257.

In this matter, the petitioner has not exhausted all his state remedies. The petitioner's statement in footnote #1 of page 8 of his brief that he had no basis to seek reargument under Rule § 500.11(g), is incorrect. 22 NYCRR 500.11(g) provides the following guidelines for rearguing a New York State Court of Appeals decision:

> **(g) Reargument of Appeals and Motions.**
>
> (1) The motion shall be made without oral argument on 10 copies of a brief or memorandum, reproduced in conformity with section 500.1 of this Part, which shall state briefly the ground upon which reargument is asked and the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portions of the record and to the authorities relied upon.

> (3) The motion may not be based on the assertion for the first time of new points except for extraordinary reasons . . .

This rule does not limit motions to reargue where there was no opinion. It is routine practice in New York to make such a motion.

As the petitioner did not fully exhaust his available remedies at the state level, his petition for a Writ of Certiorari should be denied.

II

THERE IS NO JURISDICTION SINCE THE PETITIONER FAILED TO RAISE A FEDERAL QUESTION BEFORE THE STATE COURT

There can be no Supreme Court jurisdiction under § 1257 unless a substantial federal question has been properly raised in the state court. The underlying policy considerations for this jurisdictional requirement are as follows:

(1) if a federal question was not raised before the state court, the record is most likely inadequate since it was not compiled with the federal question in mind.

(2) the state court should be given the first opportunity to review state law since it might be construed in such a way so as to save it's constitutionality.

(3) A federal question properly raised before the state court may be preempted on an adequate and independent state ground thereby precluding review of a federal issue. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). In addition, the Supreme Court is acknowledging the competency of the state courts by insisting that the state court be given the first opportunity to decide a federal question. *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

It is conceded by the petitioner in his brief that a federal question was never raised in the state court although the opportunity to do so was present during trial, on appeal to the intermediate appellate court, and on motion for leave to appeal to the state's highest court. Significantly, the petitioner did not seek additional redress by seeking reargument although it was his right to do so.

The petitioner argues that he did not raise the constitutional issue in the state courts since he anticipated that the state's highest court would agree with his position concerning intervening cause. He then cites a footnote in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, (1980) as standing for the proposition that a federal question may be raised for the first time in the Supreme Court if the highest state court renders an unexpected decision. *Pruneyard, supra* is easily distinguishable, since there, a general federal claim had been presented to the state court. Moreover, under the facts of this case, the decision of the New York Court of Appeals cannot be considered "unexpected".

The petitioner also cites *Herndon v. State of Georgia*, 295 U.S. 441 (1935), but fails to mention that in *Herndon*, the federal issue was presented in state court. "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon, supra*, at 444. Similarly, in the other cases cited in the petitioner's brief, the aggrieved parties had all filed a rehearing petition in state court to call attention to the federal question. No such petition was made here.

In addition to the above, the petitioner has not made a showing that the decision of the highest state court was a surprise that could not have been reasonably anticipated. (see *Herndon, supra*) The petitioner cannot claim surprise since this was not a matter where a decision was overturned. The intermediate appellate court *unanimously* (4-0) affirmed the

judgment of the trial court before the highest state court *unanimously* (7-0) denied the motion for leave to appeal. Eleven appellate judges of New York State found the jury charge sufficient.

Based on the above, it is respectfully submitted that the Supreme Court of the United States is without jurisdiction over this matter and this petition should be denied.

III

THE JURY WAS PROPERLY CHARGED, THUS THE DOCTRINE OF *STARE DECISIS* WAS VINDICATED

The petitioner's principal contention is that the trial court committed reversible error by not specifically charging the jury on the issue of foreseeability of an intervening cause. While foreseeability of harm is an element to be considered, "these issues *generally* are for the fact finder to resolve". *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 (1980). (emphasis added). While the New York Court of Appeals in *Derdiarian, supra*, did not address the issue of whether it would be reversible error not to charge the jury specifically on the issue of foreseeability, the above language indicates that this issue should be decided on a case by case basis. Similarly, in *Kush v. City of Buffalo*, 59 N.Y.2d 26 (1983), the Court of Appeals articulated the above standard but did not address the jury charge issue.

The petitioner also cites *Bjelicic v. Lynned Realty Corp.*, 152 A.D.2d 151 (1st Dept. 1989), where the Appellate Division ruled that the trial court had committed reversible error in refusing to charge the jury on the above issue. In *Bjelicic*, the plaintiff was working on a scaffold that was improperly secured. When the plaintiff bent over to pick something up, the scaffold moved and he fell to his death. One of the defendants illegally lent his rigging license and equipment to an unlicensed rigger. It was claimed that the act of negligently

rigging the scaffold was an intervening cause that severed the causal connection between the loan of the license and the injuries. Unlike *Bjelicic*, where there was an affirmative illegal act, the instant case involves an alleged failure to provide adequate security and to keep a floor clean. The alleged intervening act in this case involves the criminal assault undertaken by a third party, whereas in *Bjelicic*, it was claimed that the unintentional negligent act was the intervening act which superseded the intentional criminal act.

In *Bjelicic*, the court also recognized that the jurors had trouble with this issue since they requested, during deliberations, to re-hear the definition of proximate cause. The jurors in this case did not make such a request. Moreover, *Bjelicic* is a decision from the First Department, another intermediate appellate level, and is not binding precedent on the Appellate Division, Second Department or the Court of Appeals.[2] Therefore the doctrine of *stare decisis* is not applicable.

It should also be noted that the New York Court of Appeals has previously determined that the test in determining whether a jury has been adequately charged "is always whether the jury, hearing the whole charge, would gather from it's language the correct rules which should be applied in arriving at it's decision". *People v. Russell*, 266 N.Y. 147, 153. (1934).

It is evident from the charge given to the jury (see Respondent's statement of the case, pages 1-3, *supra*), that when viewed in its entirety, the charge was adequate and afforded the petitioner with a fair trial. *Bartlett v. General Electric Co.*, 90 A.D.2d 183 (3rd Dept. 1982). In addition, the petitioner was not prejudiced since the case was straight forward, the issues were simple and the law applicable to the case was fully stated in the charge. *Brown v. City of New York*, 154

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[2] The New York Court of Appeals dismissed the appeal without opinion. *Bjelicic v. Lynned Realty Corp.*, 75 N.Y.2d 947 (1990).

A.D.2d 325 (2nd Dept. 1989). Eleven appellate judges of New York State found the charge adequate.

In light of the foregoing, it is respectfully requested that this petition for a Writ of Certiorari be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: December 28, 1995

Respectfully submitted,

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